Benchmark Industries, Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL–CIO–CLC. Cases 26–CA–9011, 26–CA–9527, and 26–CA–9633

26 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 22 October 1982 Administrative Law Judge William A. Gershuny issued the attached decision. Both the General Counsel and the Respondent filed exceptions and a supporting brief, and the Respondent filed an answering brief.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions only to the extent consistent with this Decision and Order.

We do not adopt the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act when in December 1981 it unilaterally discontinued giving its employees Christmas hams and dinners. In 1978, 1979, and 1980 the Respondent had given all its employees a holiday lunch or dinner and 5-pound hams. For some unspecified period prior to 1978, Christmas meals were provided by the Respondent, but it gave no hams to the employees.

While the Board has held that an employer violates Section 8(a)(5) of the Act when it unilaterally discontinues the grant of benefits which amount to compensation or terms and conditions of employment, we do not believe that the token items involved in the present case fairly can be characterized as compensation or as terms and conditions of employment. Thus the Christmas dinners and hams had been given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors.[4] In our view the facts clearly establish that the Christmas dinners and hams were merely gifts. See *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965), denying enf. in pertinent part to 147 NLRB 179 (1964), and former Member Kennedy's dissent in *Nello Pistoresi & Sons*, 203 NLRB 905 (1973), enf. denied 500 F.2d 399 (9th Cir. 1974).[5]

Our dissenting colleague, in adopting the judge's finding of a violation, treats the Christmas dinners and hams as conditions of employment essentially because the Respondent gave them to its employees for 3 years. That, we believe, is an overly legalistic view of the employment relationship, at odds with the experience of most Americans that there may be expressions of good feeling between employer and employee which, at least at Christmas, allow for the giving of gifts with no strings attached. It is also a view which would burden the Board and the parties before it with cases where there is nothing more at stake than a dinner and a 5-pound ham, given once a year. We do not believe that the litigation of such issues furthers the purposes and policies of the Act. Accordingly, we shall dismiss the complaint in Case 26–CA–9527.

[1] The Respondent filed with the Board a motion to reopen the record to submit into evidence affidavits purportedly from certain of the Respondent's employees averring that the employees considered the Christmas dinners and hams previously given by the Respondent to be gifts and that they did not declare such items as taxable income. The Respondent further requests that the Board consider such evidence in light of an arbitrator's decision not involving the parties here which concerned an employer's gifts of Thanksgiving turkeys to its employees. Alternatively, the Respondent moves that the hearing be reopened to adduce testimony on the issue here. Thereafter, the General Counsel filed an opposition. We deny the Respondent's motion since the evidence sought to be adduced through the employees has not been shown to constitute newly discovered or previously unavailable evidence. Additionally, we deny the Respondent's request to consider the arbitrator's decision as lacking in merit.

[2] The General Counsel has excepted to the judge's ruling denying the General Counsel's request on the final day of the hearing for five subpoenas. We find it unnecessary to pass on this ruling of the judge. The purpose of the subpoenas, as stated by the General Counsel, was to attempt to obtain evidence from the personnel files of employees who had been discharged to disprove the Respondent's contention that it did not follow the three-step progressive disciplinary procedure set forth in its supervisors' handbook. However, even if such evidence had been obtained and introduced into the record by the General Counsel, the General Counsel would still have failed to establish that Michael Tramontono's discharge on 4 February 1982 was violative of Sec. 8(a)(3) of the Act. Except for Tramontono, there were no employee discharges in 1981. Thus, whether or not the Respondent utilized the progressive disciplinary procedure prior to 1981 has little bearing on or relevance to the Respondent's action in 1982. In any event, the record failed to establish any connection between Tramontono's discharge and his union activities, which occurred 8 months earlier. Accordingly, the presence of the subpoenaed information in the record would not affect our finding that the Respondent lawfully discharged Tramontono.

[3] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] Member Dennis notes also that neither the Respondent's initial decision to give Christmas dinners, nor its 1978 decision to give hams as well as dinners, nor its 1981 decision to discontinue the gifts altogether was shown to be in response to any employment-related development.

[5] Those cases, unlike the instant case, involved the discontinuance of the payment of Christmas cash bonuses. In our view there are circumstances where Christmas bonuses may become part of the employees' remuneration and, therefore, a subject over which an employer must bargain with a union prior to discontinuing such payments. However, we agree with the views of the court in *Wonder State* and of the court and former Member Kennedy in his dissent in *Nello Pistoresi* that on the facts of those cases, including the relatively short period during which the bonuses had been granted, the employers were not obligated to bargain over the discontinuance of such payments. We find the analysis used by the courts and former Member Kennedy in determining whether bonuses constituted gifts to be equally applicable here. Accordingly, to the extent the Board's decisions in those cases are inconsistent with our determination herein, they are hereby overruled.

ORDER

The complaints in Cases 26–CA–9011, 26–CA–9527, and 26–CA–9633 are dismissed.

MEMBER ZIMMERMAN, dissenting in part.

I find, for the reasons set forth by the judge, that the Respondent's discontinuance of its practice of giving to employees a dinner and a ham at Christmas after certification of the Union and without notice to or bargaining with the Union violated Section 8(a)(5) of the Act. My colleagues find that practice of supplying employees with these items not to be a term and condition of employment, but rather gifts, thereby leaving the Respondent free to confer or withhold them without any duty to bargain.

Three reasons are advanced for this view. One, the dinners and hams were "token items." Second, they were given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors. And lastly, they were given for only 3 years.

This reasoning is specious. My colleagues' classification of the items involved here as "token" serves no valid purpose in determining a bargaining obligation under Section 8(a)(5). What appears to be a token item to one person may indeed be a valuable item to another. Indeed, the employees and the Union did in fact value the Christmas dinners and hams as evidenced by their protest when the Respondent withheld these items. Such protest would be unlikely if they considered the items to be mere "tokens." Moreover, the Board and the courts have found items similar to those involved in the instant case to constitute a term and condition of employment. See, e.g., *Wald Mfg. Co.*, 176 NLRB 839 (1969), enfd. 426 F.2d 1328 (6th Cir. 1970); *Presto Casting Co.*, 262 NLRB 346 (1982), enfd. 708 F.2d 495 (9th Cir. 1983). Consequently, whether such items may be viewed as "tokens" is irrelevant if the items were given as a matter of practice.

As to the second reason advanced by my colleagues, I fail to perceive how uniformity in treatment of employees by an employer can negate an employer's bargaining obligation. The cases relied on by my colleagues involve cash bonuses given by an employer to its employees at Christmas. In those cases, as in others involving Christmas bonuses, the Board and the courts do indeed look to see if the bonus is tied to seniority, wages, or other employment-related formula—a factor clearly relevant in determining whether the item is a term and condition of employment. But the presence or absence of such a factor is not controlling. Indeed, the Board and the courts have long found uniform bonuses given to all employees to be a term and condition of employment. See, e.g., *Singer Mfg. Co.*, 24 NLRB 444, 459, 470 (1940), enfd. 119 F.2d 131 (7th Cir. 1941), cert. denied 313 U.S. 595; *General Telephone Co. of Florida*, 144 NLRB 311 (1963), enfd. 337 F.2d 452 (5th Cir. 1964). As these cases illustrate, the critical factor in determining whether cash bonuses or other items constitute a term and condition of employment is whether the employees have regularly received such items, which would reasonably lead the employees to expect and rely on such items as part of their remuneration.

Lastly, my colleagues rely on the fact that the dinner and hams were given for only 3 years. They have conveniently chosen to ignore, however, that prior to 1978 the Respondent held the Christmas dinners. Although the record is silent as to how many years the meals were provided, I cannot conclude, as do my colleagues, that the meals were provided only for a "relatively short period" of time. Nor can I limit the relevant time period to 3 years simply because for the last 3 years the Respondent has increased the bounty given to employees with the inclusion of a ham. In any event, I find the Respondent's giving of hams and dinners at Christmas for 3 years in a row established a practice which constitutes a term and condition of employment.

In sum, I agree with the judge that, given the Respondent's consistent practice of giving employees dinners and hams at Christmas, the dinners and hams became a term and condition of employment and therefore could not be unilaterally withheld by the Respondent without notice to and bargaining with the Union. Contrary to my colleagues' statement that such a result is "at odds" with the Christmas spirit of gift giving, I refer them to the following statement made by the Board over 30 years ago in *Niles-Bement-Pond Co.*, 97 NLRB 165 (1951), enfd. 199 F.2d 713 (2d Cir. 1952):

> The Christmas spirit, as we conceive it, does not stop short of the bargaining table, for bargaining in good faith is in itself a continuing effort to achieve good will between an employer and his employees.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge. A hearing was held in Corinth, Mississippi, on August 10–11, 1982, on three unrelated but consolidated complaints alleging violations of Section 8(a)(1), Section 8(a)(1) and (5), and Section 8(a)(1) and (3), respectively. Each will be considered separately below.

On the entire record, including my observation of witness demeanor, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The consolidated complaint alleges, the answer admits, and I find that Respondent, engaged in the manufacture of clothing with annual interstate shipments in excess of $50,000, is an employer under the Act.

II. LABOR ORGANIZATION

The consolidated complaint alleges, the answer admits, and I find that the Union is a labor organization under the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Case 26-CA-9633*

This complaint alleges that on February 4, 1982, button sewing machine operator Tramontono was unlawfully discharged because 8 months earlier, on June 17, 1981 (4 weeks after an election at the plant), he turned his allegiance from the Company to the Union and, to mark the occasion, wore a shirt to work with a union button on front and a sign printed on the back announcing that "all employees need respect." The General Counsel contends that the stated reason for the discharge—refusal to work required overtime—was pretextual.

The relevant facts as credited[1] are uncomplicated and, to a large extent, are not in dispute.

On February 3, 1982, Tramontono and the four other button sewing machine operators were informed by Supervisor Peggy Walls that, because the production run that day had been hampered by poor quality buttons and other production line employees were short of work, overtime would be required. Tramontono informed Walls on more than one occasion that day that he would not work overtime, shrugging his shoulders and adding that he was not up to it, but giving no medical or other reason.[2] The other operators did work overtime and Tramontono's refusal to do so resulted in far less production line work for the other 17 employees on the downstream side of the button operation on the production line. Tramontono was told to report to the plant manager's office the next morning, but he elected to speak with Plant Manager Byram that afternoon, asking him the reason for the overtime and, on a number of occasions, whether he would be fired. Byram replied that Tramontono, one of the best producers despite his constant complaints concerning repairs of the equipment, was needed on overtime and that no comment would be made then as to the possibility of discharge. After Tramontono left, Byram decided to discharge him, after considering a number of factors: that it was imperative under his Government contract to meet weekly quotas; that other employees did work overtime; and that, unless the overtime were performed, others on the line would be out of work. The next morning, Tramontono met with Byram and Grist (Byram's assistant) and was informed that he was discharged for his refusal to work overtime. Supervisor Walls, when informed of the action, wrote up the termination report in accordance with standard procedures, listing all the reasons she could think of ("my opinion of why he was fired"): "poor attendance, uncooperative and excessive absenteeism."

Company policy, as understood in Tramontono's department, required that overtime be performed unless the employee had a reasonable excuse. In the past, Tramontono had been excused from overtime on two occasions for his "nerves" and had not been disciplined. Other employees had been terminated or disciplined in the past for refusal to perform overtime, but there was no consistently applied company disciplinary policy in this or any other respect—decisions to discipline or not would take into account the number of employees needed at the moment and the number of available employees for overtime. Indeed, all evidence in this record including that offered by the General Counsel, clearly established that a supervisor's handbook which spelled out a three-step progressive disciplinary program was virtually ignored by supervisors throughout the plant with management approval, resulting in inconsistent disciplinary patterns between departments based on the predilictions of department supervisors who were authorized to mete out discipline for absenteeism, refusal to work overtime, or other breaches of company work rules. In sum, there is nothing whatever in this record to support the General Counsel's contention that the discharge of Tramontono on February 4, 1982, reflected disparate treatment by Plant Manager Byram.

The protected concerted activities of Tramontono (which the General Counsel contends were the real reasons for his February 4, 1982 discharge) all occurred 8 months prior, on June 17, 1981. At that time, Tramontono switched allegiance from the Company to the Union. Prior thereto, during the Union's organizational campaign, he spoke up for the Company at employee meetings conducted by management and, on May 13, 1981, 1 day before the election, had distributed company literature at the plant gate alongside union handbillers. His change of allegiance was the result of his frustration

[1] Where the testimony of Supervisor Walls is in conflict with that given Tramontono or other employees called by the General Counsel, that of the former is credited. Based principally on my observation of her demeanor on the witness stand, I found her to be a particularly convincing witness whose testimony was clear and straightforward and given with apparent candor and truthfulness. On the other hand, Tramontono's testimony appeared prepared and was unconvincing. In addition, it was contradictory in significant part (blood pressure taken by doctor on February 3, 1982; blood pressure taken by his nurse) and, in other significant parts, was contradicted by other evidence elicited by the General Counsel (difficulties with his machine began only after he switched allegiance to the Union in June 1981; difficulties commenced long before then when he first came to work in that department at a time when he was a company supporter) (no discipline received prior to joining the Union in June 1981; discharged for cause on March 1980). Similarly, the testimony of coemployee Farris, who recruited Tramontono to membership, is rejected as in conflict with the credible testimony of Walls and for the further reason that it was vague and appeared to be constructed for purposes of this case.

[2] Tramontono did have medical problems in the spring of 1981, but had no apparent medical problems at the time of the discharge in February 1982.

with his supervisor's inability or refusal to tell him whether the plant would remain open. On June 17, 1981, he signed a union card and wore a shirt to work with a union button on front and a handprinted sign on the back with the words, "All employees need respect or is this funny too?" The shirt produced the expected commotion on the plant floor, with employees stopping to ask what it meant and what was going on. Plant Manager Byram came to the floor to see the shirt for himself and, later, sent for Tramontono. Byram told him he could have "cried" when he saw the shirt and that he was disappointed in him, since it reflected dissatisfaction with management. When asked what the problem was, Tramontono replied that the employees were not being kept informed as to future work and the possibility of plant closure. Byram replied that Tramontono knew as much as he, Byram, did. No discipline was given or threatened and no effort was made to compel removal of the shirt. It is significant that no unfair labor practice charge was filed with respect to this incident and, of course, the complaint does not allege and the General Counsel did not contend that Byram's actions were unlawful.[3]

At no time between June 1981 (when he switched allegiance) and in February 4, 1982 (when he was discharged), was there any reference in the plant by anyone to Tramontono's conversion to the union cause, any incident relating to Tramontono's prior activities, or any complaints by Tramantono to anyone that his working conditions were being interfered with because of his activities in June 1981.[4]

Nor was there any waffling on the Company's part as to the reasons for the February 1982 discharge. The record is uncontradicted that the principal and immediate cause was Tramontono's refusal without cause to work the overtime on February 3, 1982, to which all other button sewers were assigned. Other factors in the nature of "convincers" crept into Byram's decision-making processes, but they did not alter the fact that the immediate cause was the refusal to perform required overtime. The General Counsel's contention that the subsequently prepared termination report and the Company's reports to the state unemployment compensation agency demonstrated otherwise is entirely misplaced, since those reports either were prepared solely by Supervisor Walls (who, as stated above, took no part in the discharge decision and who, without direction, gave all the reasons she could think of) or were prepared on the basis of the reasons which she alone chose to put in the termination report.

Accordingly, I find that the principal and immediate cause of Tramontono's discharge on February 4, 1982, was his refusal without cause to work the overtime required of him and the other four machine operators; that Tramontono's activities months before in joining the Union and demonstrating his change of allegiance with the wearing of a union button and an antimanagement sign on his shirt played no role whatever in plant manager Byram's decision to discharge him; and that the discharge would have occurred, under the circumstances which existed in February 1982, regardless of Tramontono's switched allegiance to the Union 8 months earlier.

The complaint in Case 26–CA–9633 is dismissed.

B. *Case 26–CA–9011*

Respondent's Motion for Summary Judgment for Dismissal of this complaint was referred to the administrative law judge for disposition by Board order of June 21, 1982 (Member Zimmerman dissenting).

The fact underlying the motion are uncontroverted.

In January 1982, the Regional Director approved an informal settlement agreement in this case, requiring Respondent to post a notice in relevant part as follows:

> WE WILL NOT tell our employees that they cannot distribute pro-union literature in non-work areas during their non-work time.
>
> WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees [in the exercise of their Sec. 7 rights].

The posting requirement thereafter was fully complied with. On April 2, 1982, however, an unfair labor practice charge was filed in Case 26–CA–9633, alleging, as discussed above, an unlawful discharge of Tramontono on February 4, 1982. Thereafter, the Regional Director vacated and set aside the settlement agreement and reasserted, in a consolidated complaint issued May 13, 1982, the originally alleged violations of Section 8(a)(1) based on Respondent's enforcement of a no-distribution rule on March 17 and April 8 and 24, 1981.

The Motion for Summary Judgment was considered by me at the conclusion of the hearing in the Tramontono case (Case 26–CA–9633) and was granted for the reason that the two occurrences are wholly unrelated. *Gulf States Manufacturers v. NLRB*, 598 F.2d 896 (5th Cir. 1979).

The Tramontono discharge did not arise out of, nor was it related in any way to, Respondent's alleged enforcement of the no-distribution rule in the spring of 1981. Indeed, there is no evidence that Tramontono was engaged in any organizational activity on the three dates alleged (March 17 and April 8 and 24) or that he enforced the rule or had it enforced against him on any occasion. During the campaign Tramontono was a compa-

[3] Moments before the close of the hearing, the General Counsel moved to amend the complaint to allege an 8(a)(1) violation based on the event. Because the incident was fully described in Tramontono's April 1982 affidavits to the Board, the motion was denied as untimely. Similarly, a motion to amend, by alleging a disciplinary warning for absenteeism on August 4, 1981, as unlawful, was denied as untimely. It should be noted that Tramontono did not testify that the warning was not warranted and did not file an unfair labor practice charge. Nor did the complaint allege such a violation, despite the fact that all the circumstances were disclosed several months earlier in Tramontono's affidavits to the Board. In any event, Tramontono was in error in testifying that he received no discipline prior to his joining the Union in June 1981 and that the August 4, 1981 warning (after his change of allegiance) was the first he had received, since in March 1980 (long before switching allegiance) he was discharged for cause by Supervisor Walls.

[4] As indicated in fn. 1 above, Tramontono's testimony that, after he joined the Union, he experienced such difficulty with the machine that his earnings were impaired (implying that Respondent unlawfully failed or refused to repair the machine properly) is rejected as lacking in credibility. The General Counsel herself impeached that testimony by eliciting from his supervisor that Tramontono's machine problems existed long before he joined the Union and that his problems always were obsessive and, to a large extent, unfounded in fact.

ny supporter. His discharge was unrelated to the originally alleged violation: as alleged, it was due to his Section 7 activities in June 1981; as found, it was due to his refusal to work overtime on February 3, 1982. On this record, I find that the Regional Director had no reasonable basis in law or fact to revoke and set aside the settlement agreement in this case.

C. *Case 26–CA–9527*

This complaint alleges that in December 1981 Respondent unilaterally discontinued its past practice of providing employees a Christmas meal and a ham.

The relevant facts are either stipulated or undisputed. In 1978, 1979, and 1980, Respondent provided a holiday dinner or lunch for its employees during the Christmas season. Five-pound hams were given as gifts. No meal or gift was given in 1981, the Company asserting truthfully that in 1981 it suffered a substantial loss, whereas in 1980 it had made a profit. The Union was not notified. The election had been held in April 1981 and the Union was certified in June 1981. Thereafter, Respondent sought to test the status of the Union by refusing to bargain. Summary Judgment was entered by the Board in June 1982. Prior to 1978, Christmas meals were provided by Respondent, but no gifts were given. Neither the holiday meal nor the gift was ever described by management or considered by any employee to be an employment benefit. And finally the record is silent as to whether the meals were of comparable value from year to year.

The law is clear, and Respondent does not argue to the contrary, that an employer violates its obligation to bargain when it effects changes in employment conditions without first consulting with the Union (*NLRB v. Katz*, 369 U.S. 736 (1962)) and this duty to bargain arises as of the date of the election.

Respondent defends, however, on the theory that the meal and hams were discretionary gifts and, hence, not conditions of employment. It relies principally on *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965). There, a holiday bonus was given in prior years based on a number of vague economic factors. It was stopped without bargaining. The court held that the bonus was a gift and that the employer had no obligation to bargain over its discontinuance. *Wonder State*, however, is inapplicable on the facts. Here, the practice was consistently followed for more than 3 years; it did not appear to be tied to profits or other economic factors; and it took substantially the same form each year. *Nello Pistoresi & Sons*, 203 NLRB 905 (1973), is dispositive. There, the Board found violative of the Act an employer's discontinuance of a holiday bonus which had been paid for only 2 years and had been based on a purely subjective formula which took into account length of service and work performance. Of course, it makes no difference from a legal standpoint whether, as here, the gift takes the form of food or, as in *Nello Pistoresi*, the bonus takes the form of cash. Each, through consistent practice, becomes a part of the compensation package, subject to the obligations of bargaining before change. Nor does it make a difference from a remedy standpoint that difficulty may be encountered in determining the value of the gift. That, said the Board in *Nello Pistoresi*, was to be left to agreement of the parties or to the backpay proceeding.

I conclude that Section 8(a)(5) was violated in 1981 by Respondent's discontinuance of the Christmas meal and gift of a 5-pound ham, as alleged.

[Recommended Order omitted from publication.]